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No. 138

In the Supreme Court of the United States

OCTOBER TERM, 1932

JOSEPH F. MILLER, PETITIONER

v.

A. C. ADERHOLD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition.

OPINIONS BELOW

No opinion was rendered by the District Court. The *per curiam* opinion of the Circuit Court of Appeals (R. 7) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 20, 1932. (R. 8.) A petition for rehearing was denied March 11, 1932.

(R. 10.) The petition for certiorari was filed June 6, 1932. Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the suspension of the imposition of sentence upon the petitioner was invalid.

2. If so, whether sentence was properly imposed at a later term.

STATEMENT

On December 10, 1930, petitioner pleaded guilty in the United States District Court for the Southern District of New York to a charge of stealing from the United States mails. On the same day the court suspended the imposition of sentence and ordered the defendant discharged from custody. The order of the trial judge itself is not in the record,[1] nor does it appear what, if anything, the judge said orally at the time. (R. 2.) On June 17, 1931, two months after the expiration of the term (Judicial Code, Sec. 97 (U. S. C., Title 28, Sec. 178); General Rule 6 of the United States District Court for the Southern District of New York), petitioner was sentenced by another judge of the same court

[1] The complete record in the District Court for the Southern District of New York does not appear in the record in the instant case. The facts above stated are taken from copies of the docket entries and two brief extracts of the clerk's minutes which were attached as exhibits to the petition for a writ of habeas corpus.

to serve four years' imprisonment in the United States Penitentiary at Atlanta, Georgia, the sentence to run from that date. (R. 3.) Whether the petitioner was present at this time, and what, if anything, was said by the judge does not appear. The order of the court itself is not in the record. On October 27, 1931, a motion to vacate the sentence was made and denied. No appeal from the order of denial was taken. (R. 2.)

Thereafter, on or about November 12, 1931, petitioner filed in the United States District Court for the Northern District of Georgia a petition for a writ of habeas corpus wherein he asserted that he was being unlawfully deprived of his liberty by respondent, as warden of the United States Penitentiary at Atlanta, Georgia, because the judgment upon which petitioner's commitment was based was rendered by a court which was without jurisdiction and was therefore void. (R. 1–2.) The writ issued, but following a hearing, the court ordered it dismissed and petitioner remanded to the custody of respondent. (R. 4.) Upon appeal, the order of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. (R. 8.)

DISCUSSION

If the suspension of the imposition of sentence was valid, it is clear that the District Court possessed jurisdiction subsequently, within or after

the term, to impose sentence. *Miner* v. *United States,* 244 Fed. 422, 424 (C. C. A. 3d).

The petitioner contends that the suspension of sentence was void because, he asserts, it was indefinite and unconditional. He argues that prior to the enactment of the Federal Probation Act (U. S. C., Title 18, Secs. 724–727) the suspension of sentence would have been void under *Ex parte United States,* 242 U. S. 27, and that under the Federal Probation Act the suspension of sentence can not be sustained because the District Judge did not place the petitioner upon probation for a fixed period and upon specific conditions, as, he asserts, is contemplated by that statute. We believe that the suspension of sentence was valid either under or apart from the Probation Act, but there appears to be some conflict of decisions upon both phases of this question.

Ex parte United States, supra, does not establish that a United States District Judge is wholly without power to suspend the imposition of sentence, but that he has no power, apart from a statute, to suspend the imposition of sentence *permanently,* i. e., that he is without authority to exempt the convict permanently and absolutely from the punishment provided by the statute. The Court recognized the power of the trial court temporarily to suspend either the imposition or execution of sentence when done for a purpose incident to the imposition of the sentence, "such as to give opportunity for a motion for a new trial or in ar-

rest, or to enable the judge to better satisfy in his own mind what the punishment ought to be." (242 U. S. 27, 44, 46.)

In the case at bar it does not appear that the District Judge intended the suspension of sentence to be permanent or to operate in any way as a reprieve or pardon. So far as the record discloses he may have deferred the imposition of sentence only temporarily for the purpose of securing further data which he deemed requisite to the imposition of the sentence. If the suspension were for that or a similar purpose, it would clearly have been valid. In the absence of any facts explaining the suspension of sentence, we submit that this Court should presume the facts to be such as to make the suspension legal rather than illegal. *Miner* v. *United States,* 244 Fed. 422, 424 (C. C. A. 3d); *Musick* v. *United States,* 2 F. (2d) 711, 712 (C. C. A. 3d). In the *Miner case, supra,* the court said (p. 424):

> We should not assume that it [the suspension of sentence] was actuated by improper or unlawful considerations. Nor does the court's purpose appear. But every legal intendment favors the notion that it had a purpose and that the purpose was lawful. In fact, we must assume, in the absence of anything in the record to the contrary, that the postponements were made for a lawful purpose in the orderly progress of the case. This being true, the validity of the orders postponing sentence is established, leaving

for decision no question of the court's jurisdiction to impose sentence at a later term.

While the above views seem clearly to be correct, there are decisions which indicate that any *indefinite* suspension of sentence, where it extends beyond the term, is beyond the power of a United States District Judge. See *Mintie* v. *Biddle,* 15 F. (2d) 931, 932, 933 (C. C. A. 8th).

Even if the suspension of sentence was invalid under *Ex parte United States, supra,* we believe that it was valid under the subsequently enacted Federal Probation Act, and it has been, in effect, so held. *Ex parte De Angelo,* 50 F. (2d) 847 (C. C. A. 4th). See also *Finer* v. *Commonwealth,* 250 Mass. 493; *People* v. *Patton,* 221 N. Y. 409. But in *Hodges* v. *United States,* 35 F. (2d) 594, 595 (C. C. A. 10th), the court held to be void "an order, which was not an order of probation made pursuant to authority given by section 724, Tit. 18, U. S. C. (18 U. S. C. A. § 724), but an attempt to suspend the sentences * * *." In the case at bar the suspension of sentence did not purport to be an order of probation and the Circuit Court of Appeals did not rest its decision upon the Federal Probation Act.

Assuming the suspension of the imposition of sentence to have been invalid, a further question arises as to the legal effect of such an invalid order upon the jurisdiction of the trial court to impose sentence after the expiration of the term. In cases arising prior to the Federal Probation Act it has been held, erroneously we submit, that the effect

of an invalid, indefinite suspension of sentence is to deprive the trial court of jurisdiction to impose sentence at a later term. *United States* v. *Wilson,* 46 Fed. 748 (C. C., D. Idaho); *Ex parte Singer,* 284 Fed. 60 (C. C. A. 3d); *Mintie* v. *Biddle,* 15 F. (2d) 931 (C. C. A. 8th), *supra.* Other courts, reaching a conclusion which we believe clearly to be correct, have held that jurisdiction to impose sentence is not lost after the expiration of the term because of an invalid order suspending the imposition of sentence. *Hammers* v. *United States,* 279 Fed. 265 (C. C. A. 5th). See also *United States* v. *Bishop,* 47 F. (2d) 95 (C. C. A. 5th); *Bryant* v. *United States,* 214 Fed. 51 (C. C. A. 8th); *Ex parte Peeke,* 144 Fed. 1016, 1020 (N. J.), affirmed, 153 Fed. 166 (C. C. A. 3d).

CONCLUSION

While we believe the decision of the Circuit Court of Appeals to be correct we do not feel warranted in opposing the petition in view of the conflict of decisions upon various phases of the questions involved.

Respectfully submitted.

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